BALAKRISHNAN VAIRAVAPILLAI

v.

PANTAI HOLDINGS BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[PETITION NO: D4-26-6-2002]
1 OCTOBER 2004

COMPANY LAW: *Members' rights - Oppression - Petition by minority shareholder under s. 181 Companies Act 1965 - Whether petitioner had a cause of action - Whether petition a mere "fishing expedition" - Whether an abuse of process of court - Companies Act 1965, s. 181*

CIVIL PROCEDURE: *Striking out - Grounds for - Petition by minority shareholder under s. 181 Companies Act 1965 - Whether petitioner had a cause of action - Whether petition an abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d) - Companies Act 1965, s. 181*

These were two separate applications by the respondents seeking to strike out the petitioner's petition pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('the RHC') ('encl. 22') and O. 18 r. 19(1)(b) or (c) or (d) of the RHC ('encl. 23') respectively. The petitioner's complaints in the petition were directed against the acquisition of certain companies by the second respondent, the issues mainly being: (i) that the acquisitions were unreasonably and/or exorbitantly priced without having true regard to the true valuation, intrinsic value or earning capacity of the acquiree companies; (ii) that the acquisitions at that price would enrich the vendors of the acquiree companies while diluting the petitioner's shareholding; (iii) in connection therewith, the valuation of the acquisitions by one Messrs Arthur Anderson & Co was not independent; and (iv) that there were strong reasons to believe that the shareholders and directors of the companies were nominees unnamed, and such persons unnamed could be parties related to the majority shareholders in the first respondent.

Held (allowing the applications):

[1] As a minority shareholder, the petitioner did not have any legitimate expectation to dictate the management decisions of the board of directors, and so long as the decisions were not taken unreasonably or without any foundation, the fact that they may have been wrong did not entitle shareholders to apply under s. 181 of the Companies Act 1965 ('the CA'). The petitioner had only made unfounded inferences and conclusions that the vendors of the acquiree companies were nominees for persons unknown and that the majority shareholders were related parties to the transactions. Even if the petitioner's allegations were true, it was settled law that any shareholder was entitled in a general meeting to vote in any way they deemed fit, and owed no duty to anybody as how such a vote was to be exercised. (pp 98 b-c & 99 g-h)

[2] On the facts, it seemed that the petitioner neither objected to the acquisitions *per se* nor did he challenge the basis, methodology and valuation by Messrs Arthur Anderson & Co. At most, the petitioner's allegations merely showed that the petitioner was dissatisfied with the commercial aspects of the acquisitions. However, it must be emphasised that the shareholders of the first respondent and the relevant regulatory authorities had already approved the acquisitions. The petitioner had not alleged that both the respondents had committed any wrongdoing, and neither had he made out any allegation that he had been oppressed in any particular way. The petitioner was merely contending that a trial should be conducted in order to ascertain whether any wrongdoing had been committed. Thus, the petition was being used as a fishing expedition to discover any improprieties with the silent hope of bringing this case within the ambit of s. 181 of the CA. The petition herein disclosed no cause of action and was otherwise manifestly unsustainable; it was nothing more than an abuse of the process of the court, and should be struck out. (pp 88 f-h & 89 a, e & g-h)

Case(s) referred to:

Christie v. Christie [1873] LR 8 Ch App 499 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Macdougall v. Gardiner [1875] 1 Ch D 13 ***(refd)***

Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601 HC ***(foll)***

Ong Lean Sim & Anor v. Tio Kah Hin & Ors [1985] 1 MLJ 270 ***(refd)***

Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors [1989] 3 MLJ 73 ***(foll)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(foll)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Re a company, ex p Burr [1992] BCLC 724 ***(refd)***
Re Bright Pine Mills Pty Ltd [1969] VR 1002 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 ***(foll)***
Re Lundie Brothers Ltd [1965] 2 All ER 692 ***(refd)***
Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 ***(foll)***
Re Tong Eng Sdn Bhd (Loh Loon Keng, petitioner) [1994] 1 MLJ 451 ***(refd)***
Re Tri-Circle Investment Pte Ltd [1993] 2 SLR 523 ***(foll)***
Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings And Other Appeals [1997] 1 CLJ 463 CA ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 181, 218, 365(1A)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), (2)

For the petitioner - Jadadish Chandra; M/s Arbain & Co
For the respondents - Christopher Leong Sau Foo (Lim Tuck Sun); M/s Chooi & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

There are two enclosures filed by both the respondents for me to decide. The first is encl. 22. The second is encl. 23.

Enclosure 22 is an application by the first and second respondents *via* summons in chambers dated 26 April 2002 to strike out the petition of the petitioner pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ("RHC").

While encl. 23 is also an application filed by the first and second respondents *via* summons in chambers dated 26 April 2002 to strike out the petition of the petitioner pursuant to O. 18 r. 19(1)(b) or (c) or (d) of the RHC.

Preliminary Objections

The petitioner submits that both the respondents must make an election: either to proceed with encl. 22 or with encl. 23. It is submitted that by its very nature the hearing of both enclosures, filed under the same rule of the High Court would be prejudicial to the petitioner.

I beg to disagree. As litigants both the respondents are entitled to file encls. 22 and 23. No one can stop them. It is settled law that limbs (a) to (d) of O. 18 r. 19(1) of the RHC are disjunctive and both the respondents may rely on any or all of the limbs (a) to (d) in their O. 18 r. 19(1) of the RHC application. Furthermore, there is no requirement in law for both the respondents to elect between limb (a) and limbs (b), (c) and (d) of O. 18 r. 19(1) of the RHC. It is part and parcel of my judgment that an application under limb (a) of O. 18 r. (1) of the RHC does not preclude an application made under limbs (b), (c) and (d) of O. 18 r. (1) of the RHC because the court is always able and willing to hear and consider such an application. Cases like *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain* [2000] 2 CLJ 601; and *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716, FC are relevant to the occasion because these two cases made it clear beyond per adventure that an application may be made under all the four (4) limbs of O. 18 r. 19(1) of the RHC and the litigants like the respondents here need not elect between the various limbs. This simple proposition of the law is really apt. It makes sense. I say that the proposition of the law as stated by these two cases is applicable whether the litigant relies on all the four (4) limbs in a single application as in *Malayan United Finance* and in *Owen Sim* or the litigant makes two (2) separate applications for the purposes of clarity – meaning one under limb (a) and the other under limbs (b) to (d) of O. 18 r. 19(1) of the RHC. Here, both the respondents as active litigants filed encls. 22 and 23 and they are certainly entitled to do so and they should not be required to make an election. This is my judgment and I so hold accordingly.

Other Preliminary Points Raised By The Petitioner

Having perused through the petition, it is my considered view that it is entirely an exercise in speculation on the part of the petitioner when he files the petition. It should not be filed at all. Precious judicial time is wasted. The petition is nothing more than an exercise in futility.

Two particular allegations advanced by the petitioner need to be resolved. They may be stated as follows:

(i) that there are discrepancies in the payment arrangements between Anjur Dinamik Sdn Bhd ("ADSB") and Pengkalan Usaha (M) Sdn Bhd ("PUSB") – in that ADSB only earns RM21 per worker while paying RM65 per worker to PUSB; and

(ii) that a vendor of the shares in PUSB is related to one Dato' Dr. Haniffa, a shareholder of the first respondent, in that she is married to Dato' Dr. Haniffa's brother-in-law.

Without hesitation, I say that these allegations are irrelevant to the petition herein. They are mere surplus verbiage and therefore cannot be entertained because these allegations are not made in the petition itself. Legally speaking, it is wrong for the petitioner to travel outside the allegations made in the petition itself. What is not averred in the petition should not be raised at all. Plowman, J in *Re Lundie Brothers, Ltd.* [1965] 2 All ER 692, at p. 699 had occasion to say the same thing:

> It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter. I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity. However that may be, in my judgment the petitioner has failed to establish any case of oppression in regard to the matters to which I have referred.

Bluntly put, the petitioner is not entitled to raise by affidavits matters that are not raised in the petition. That being the law, I must hold as a matter of law that these blatant allegations ought to be disregarded forthwith. In addition to that, I say and I so hold that these allegations are wholly misconceived and without merit.

In the event I am wrong in my approach, I have this to say.

The alleged discrepancies in the payment arrangements are nothing more than a storm in the teacup. The medical examination fees payable to Fomema per foreign worker are RM155 per male worker and RM165 per female worker. A service fee of RM25 is also charged by Fomema. Calculation wise, Fomema charges a total of RM180 per male worker and RM190 per female worker. Fomema subcontracted the Medcontrol portion of the concession to ADSB and ADSB then appointed PUSB as its subcontractor to undertake part of the services relating to Medcontrol. Now, out of the aforesaid sums charged by Fomema, the sums of RM130 per male worker and RM140 per female worker are paid to ADSB in respect of expenses for medical examination, X-ray and laboratory tests. In return, ADSB pays the sums of RM65 per male worker and RM75 per female worker to PUSB out of the sums of RM130 and RM140. To say that ADSB would only receive RM21 from Fomema while paying out RM65 and RM75 to PUSB is certainly untrue. What actually happens is this. That Fomema pays ADSB RM21 directly pursuant to cls. 1.2

(c) and 2 of the sub-contract between Fomema and ADSB dated 1 October 1997 (see exh. P7 of the petitioner's 4th affidavit). This is entirely within the purview of Fomema to do bearing in mind that Fomema charges RM25 as a service fee. Incidentally, as a matter of record, the sums of RM65 and RM75 are paid by ADSB to PUSB out of the sums of RM130 and RM140. For these reasons, there are no discrepancy or inconsistency between the incomes of PUSB and ADSB as alleged by the petitioner.

I have the following observations to make:

(1) the petitioner has not made out any allegation that he has been oppressed in any particular way by virtue of the alleged discrepancies in the payment arrangements;

(2) the petitioner too has not alleged that both the respondents had committed any wrongdoing in connection with the aforesaid matters;

(3) at its highest point, the petitioner has merely expressed his misgivings about the commercial aspects of the acquisitions which I will allude to it in the later part of this judgment; and

(4) it seems that the petitioner merely requires a full hearing for the alleged discrepancies to "be explained" and this amounts to nothing more than a fishing expedition and it constitutes an improper use of the process of the court and the remedy proffered under s. 181 of the Companies Act 1965.

In regard to the alleged relationship between the shareholders of the acquiree companies, I have this to say.

The issue in the petition is rather simple. It is this. Whether ADSB, PUSB and Healthpac Industries Sdn Bhd ("HISB") were acquired at a fair price? It seems to me that the petitioner neither objects to the acquisitions *per se* nor does he challenge the basis, methodology and the valuation by Messrs. Arthur Anderson & Co. The petitioner has not alleged that both the respondents have committed any wrong doing. The petitioner too has not made out any allegation that he has been oppressed in any particular way. The petitioner is merely contending that a trial should be conducted in order to ascertain whether any wrong doing had been committed. I cannot help but feel that the petition is being used as a fishing expedition to discover whatever improprieties with the silent hope of bringing this case within the ambit of s. 181 of the Companies Act 1965. It is for these reasons that I say that the petition is an exercise in speculation and it is nothing more than an abuse of the process

of the court. In my considered view, the remedy under s. 181 of the Companies Act 1965 cannot be used as a tool to satisfy the curiosity of the petitioner.

I have taken the liberty of reading the case of *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634, a decision of the Court of Appeal which was relied upon by the petitioner particularly to the following passage that appears at p. 646 of the report:

> Now, there are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under section 218 of the Act since it could cause further delay rather than expedite the disposal of such matter.

That passage, with respect, was made in the context of a winding up petition under s. 218 of the Companies Act 1965. And, consequently, the Court of Appeal expressed the view that the use of the striking out procedure in winding-up proceedings would only delay the adjudication of the matter (see p. 647 d of the report of that case). The Court of Appeal then proceeded to state expressly that O. 18 r. 19 of the RHC can only be resorted to where the petition presented is obviously unsustainable for want of a cause of action or is plainly vexatious or frivolous or is an abuse of the process of the court (see p. 647 d-e of the report of that case). I will, in the course of this judgment, show that the petition herein discloses no cause of action and that it is otherwise manifestly unsustainable and is nothing more than an abuse of the process of the court. To me, this is indeed a fit and proper case for the petition to be struck out. In the past the courts have been magnanimous and have ordered that petitions brought under s. 181 of the Companies Act 1965 be struck out pursuant to O. 18 r. 19 of the RHC where appropriate (*Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals* [1997] 1 CLJ 463, CA; and *Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)* [1994] 1 MLJ 451).

The two allegations made by the petitioner as alluded to above do not in any way go to show that he had been personally oppressed or disregarded. At most, these two allegations merely go to show that the petitioner is dissatisfied with the commercial aspects of the acquisitions. Nothing less and nothing more. It must be emphasised that the shareholders of the first respondent had already approved the acquisitions in the meeting of 5 February 2002 and that the acquisitions have been approved by the relevant regulatory authorities. Everything has been done above board. Very transparent and very real.

a **Overlapping Of The Facts**

In quick succession, I will examine encl. 22 first and then followed by encl. 23. I must place a caveat that in narrating the facts governing encl. 22, it may overlap with those of encl. 23. I will endeavour to avoid repetition in my treatment of encl. 22 with that of encl. 23.

b **Enclosure 22**

It is fashioned under O. 18 r. 19(1)(a) of the RHC. It prohibits the use of affidavit evidence and it confines the court to the four corners of the pleadings (see O. 18 r. 19(2) of the RHC). In enclosure one (1), the petitioner seeks for the following reliefs:

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1) A declaration that the Directors of the Company have breached and/or failed in their fiduciary duties.

2) A declaration that the Directors of the Company have conducted the affairs of the Company and/or exercised their powers in a manner
d oppressive to Your Petitioner and/or in disregard to the interest of Your Petitioner.

3) An Injunction to restrain the Respondents, through its Directors, servants, agents or employees, or through its wholly owned subsidiary PSS (referring to the second respondent), from acquiring ADSB, PUSB and
e HISB and/or from issuing or causing to be issued 92,966,361 new PHB (referring to the first respondent) shares of RM1.00 each to the vendors of the Acquiree Companies until the final disposal of the KDM (referring to Koperasi Doktor Malaysia Bhd) suit and an independent valuation report on the Acquiree Companies being obtained, whichever is later.

f 4) A declaration that the valuation report by Arthur Anderson & Co dated 21st January, 2002 is not an independent valuation report within the contemplation of the condition laid down by the SC (referring to the Securities Commission) in its approval dated 10th May, 2001.

5) An order that the Company cause to be obtained, at its own costs and
g expense, an independent valuation report pertaining to the fair valuation of the 3 Acquiree Companies.

6) An order that the Company do pay Your Petitioner damages to be assessed.

h 7) An order that duly authorised representatives of an accredited accounting firm appointed by Your Petitioner and a solicitor of your Petitioner's choice be permitted and/or allowed to obtain, search, inspect photograph or photocopy any document and/or article which are believed by them to be relevant to ascertain the true and genuine owners of ADSB, PUSB and/or HISB and thereafter to file a report of the said search and/or
i inspection to this Honourable court.

8) An order that the Respondent Company pay all the costs of this Petition and other related matters thereto.

9) All such orders directions pursuant to Section 181(2)(b) of the Companies Act, 1965 as this Honourable court deems fit and proper for the future conduct of the Respondent Company with a view to bringing to an end or remedying the matters complained of.

10) Further and/or in the alternative an order that the Company be wound up.

11) Such further or other relief deems fit and proper by this Honourable court.

As at the date of the petition and that would be on 14 February 2002, the petitioner was the registered shareholder of 56,000 shares in the first respondent, representing approximately 0.08% of the total issued and paid up share capital of the first respondent.

I will now proceed to narrate the salient facts pertinent to the case at hand and deal with them under separate sub-heads:

The Acquisitions

It is ideal to state that the second respondent had entered into three separate share sale agreements dated 28 February 2000 to acquire the entire issued and paid up share capital of ADSB, PUSB and HISB (hereinafter referred to as the "acquisitions"). The consideration sum of the acquisitions was RM304,000 which was to be paid by the issuance of a total of 92,966,361 shares in the first respondent at a price of RM3.27 per share. A public announcement concerning the acquisitions was made by the first respondent to the Kuala Lumpur Stock Exchange ("KLSE") on 29 February 2000. ADSB holds 75% of the shareholding in Fomema, the only company which has been awarded a concession by the Government of Malaysia to provide supervision and monitoring services relating to the health care of foreign workers seeking employment in Malaysia. ADSB was also appointed by Fomema to implement a system of medical control and supervision consisting of medical inspectorate services as well as regional offices. PUSB was appointed by ADSB as its sub-contractor to undertake part of the services pertaining to Medcontrol (a system of medical control and supervision consisting of medical inspectorate services and regional offices set up by Fomema), particularly those relating to monitoring, supervision and quality control of laboratories. It is pertinent to point out that HISB was appointed by PUSB as its sub-contractor to undertake a major portion of services relating to laboratory tests which is part of Medcontrol. It is said that the acquisitions operate to give the first respondent a controlling stake in Fomema, which is the only company which has been

awarded the aforesaid concession by the Government of Malaysia. Any change in the shareholding structure of Fomema requires the approval of the Economic Planning Unit ("EPU"). The approval of the EPU to the acquisitions by the second respondent of the issued and paid up share capital of ADSB was given on 19 April 2001. The Securities Commission ("SC") had on 10 May 2001 given its approval for the acquisitions and this is not disputed by the petitioner. Even an extraordinary general meeting of the first respondent's shareholders was called on 5 February 2002 to seek approval for, *inter alia*, the acquisitions. The petitioner attended and spoke thereat and voted against the same. The acquisitions were then approved by the shareholders of the first respondent.

The Petitioner's Complaints

It seems to me that the petitioner's complaints in the petition are directed against the acquisitions and they may be stated as follows:

(1) the acquisitions are unreasonably and/or exorbitantly priced without having regard to the true valuation, intrinsic value or earning capacity of the acquiree companies;

(2) the acquisitions at that price will therefore enrich the vendors of the acquiree companies while diluting the petitioner's shareholding;

(3) the petition filed by Koperasi Doktor Malaysia Bhd ("KDM") against ADSB would affect the pricing of the acquisitions;

(4) the price of the acquisitions should be revised downwards in view of the falling share price of the first respondent, the economic slowdown, the fall in the KLSE composite index and the terrorist attacks of 11 September 2001;

(5) in connection therewith, the valuation of the acquisitions by Messrs. Arthur Anderson & Co is not independent; and

(6) there are "strong reasons to believe" that the shareholders and directors of PUSB and HISB are nominees for persons unnamed, and such persons unnamed "could be" parties related to the majority shareholders in the first respondent.

It is crystal clear that even disregarding the petitioner's averments in his affidavits, the petitioner has no objection to the acquisitions *per se*. His objections merely relate to the pricing and that Messrs. Arthur Anderson & Co is not an independent valuer and therefore its valuation of the consideration for the acquisitions should not be accepted. But it must be emphasised that, at this point of time, the summary of the valuation of the acquisitions by

Messrs. Arthur Anderson & Co was disclosed to the first respondent's shareholders in the first respondent's circular issued for the purpose of the shareholders meeting scheduled on 5 February 2002. The petitioner merely complains that the valuation report is not independent but he does not at any point in time in the petition dispute the basis or factors taken into account for the valuation nor the methodology adopted by Messrs. Arthur Anderson & Co in valuing ADSB, PUSB and HISB. So, it is appropriate to say that when viewed against this background, the petition can be said to be based on mere speculation. I have said it before and I now say it again. Pure speculation.

The Law Pertaining To Striking Out A s. 181 Petition Under O. 18 r. 19(1)(A) Of The RHC

As a guideline the case of *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals (supra)* should be referred to. That was a case where a petition presented under s. 181 of the Companies Act 1965 was struck out under this limb by the Court of Appeal. The Court of Appeal in that case laid down the following principles of law:

(1) in deciding whether a petition ought to be struck out, one should not premise on whether there are further facts that the petitioner can establish at the trial or whether further research can lend support to the petitioner's claim;

(2) the court will only look at the primary facts alleged by the petitioner and will not assume the truth of the petitioner's inferences from those facts unless those inferences necessarily follow and neither will the court accept the "conclusions" alleged by the petitioner;

(3) that the relief under s. 181(1)(a) of the Companies Act 1965 is only available if:

(i) those having control over the respondent company's affairs have conducted the same in a manner oppressive to the petitioner in question;

(ii) the directors of the respondent company in question have exercised their powers in a manner oppressive to the petitioner; or

(iii) either act in (i) or (ii) above are being done in disregard of the petitioner's interests as a member;

(4) by the same token, relief under s. 181(1)(b) of the Companies Act 1965 is only available if there is some act or resolution that unfairly discriminates against the petitioner in his capacity as a member of the respondent company;

(5) in deciding what amounts to "oppression" or "disregard" the test set out in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. v. Ling Beng Sung* [1978] 2 MLJ 227, PC applies in that:

(i) there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play; or

(ii) there must be an awareness of the minority interest in question coupled with an evident decision to override it, brush it aside or set at naught the proper company procedure and that the mere failure to take that interest into account is not enough; and

(6) finally, the court may strike out a petition even though it requires a long and elaborate hearing before the court is satisfied that there is no cause of action.

It is the stand of both the respondents here that the primary facts as set out in the petition herein cannot constitute an oppression under s. 181 of the Companies Act 1965. It is also the stand of both the respondents that the petitioner's complaints, even without giving due regard to the respondents' affidavits in reply, have no basis in fact or in law. I agree wholeheartedly with the positions taken by both the respondents.

The Reasons As To Why The Petition Ought To Be Struck Out

For this exercise, I shall examine the following points:

(i) The Primary Facts Do Not Disclose Any Oppression

In considering the primary facts as set out above, one should and must be willing to ignore the petitioner's inferences and alleged conclusions from those facts *(Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals (supra))*. That being the case, it is part and parcel of my judgment that the following contentions should not be accepted:

(1) the petitioner's inference that the shareholders and directors of PUSB and HISB are nominees for persons unnamed, merely because the petitioner has made a bald statement that they are not well known in the healthcare industry nor are they well known corporate figures. The petitioner's inference that such shareholders and/or directors are nominees does not necessarily follow from their lack of fame; and

(2) the petitioner's related "conclusion" that the shareholders and directors of PUSB and HISB are nominees for parties related to the majority shareholders in the first respondent are baseless as there is no basis for such a conclusion.

It must be placed on record that the following observations should be put in the forefront as they would show the weaknesses of the petition:

(1) the petition does not contend that the first respondent and/or the second respondent are not entitled to enter into the acquisitions;

(2) the central issue is therefore whether the acquisitions were made at a fair value;

(3) the lack of publicity or fame of the shareholders and directors of PUSB and HISB is certainly irrelevant in the context of whether the acquisitions were made at a fair value;

(4) that even if one of the shareholders of HISB is a solicitor of the first respondent, it is irrelevant in the context of whether the acquisitions were made at a fair value;

(5) it cannot be denied that the petitioner was aware of the basis and methodology of the valuation because para. 8.5 of the petition makes it clear that the summary of the valuation report was disclosed in the first respondent's circular to its shareholders;

(6) the petitioner fails to challenge and does not challenge the contents of the valuation report in the petition nor does the petitioner allege that the report and its conclusions are flawed – it must be recalled that the petitioner merely states that Messrs. Arthur Anderson & Co is not an independent valuer; and

(7) as far as the petitioner's contention that the consideration for the acquisitions should be revised downward in view of the drop in the first respondent's share price between 2000 and 2002, it is prudent to remember that the consideration sum for the acquisitions to be paid is by way of the issuance of shares to the vendors. In fact, there is no basis in the petitioner's allegations, because if a revision was to be undertaken, a drop in the share price would mean an upward revision of the number of shares to be issued to the vendors. It is rather obvious that no such upward revision has been done and so the petitioner's contentions are and must be said to be groundless.

a It is therefore not wrong to say that the only issue here is whether the acquisitions were over priced. In this connection, I have this to say:

(1) that there is no basis whatsoever to say that the acquisitions are overpriced bearing in mind that apart from stating that Messrs. Arthur Anderson & Co is not independent, the petitioner has not even given any material facts b nor substantiated his averments to show as to why the valuation is inaccurate or wrong in any respect;

(2) since EPU and SC have approved the acquisitions there can be no basis for contending that there is any impropriety in the said acquisitions;

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(3) it must not be forgotten that the decision to proceed with the acquisitions is purely a matter for the management of the first respondent;

(4) the petitioner has not shown why he has a legitimate expectation to override or dictate the management decisions of the first respondent's d board of directors;

(5) the acquisitions are done aboveboard and it must be emphasised that the first respondent's shareholders have approved the acquisitions;

(6) the petitioner has not shown in what way he, as a mere shareholder e holding a 0.08% stake, can override the resolution of the majority of the first respondent's shareholders; and

(7) sad to say, nowhere in the petition has the petitioner shown how he had been oppressed or disregarded or unfairly discriminated against in any way.

f *(ii) The Petition Has No Basis In Law Whatsoever*

As I see it, the petitioner appears to be unhappy with the valuation of the acquisitions and the decision of the first respondent's board of directors and its shareholders pertaining to the acquisitions. The petitioner does not contend and cannot contend even if he wants to that both the respondents are not g entitled to enter into the transactions in the very first place. At this juncture, it is appropriate to refer to the case of *Macdougall v. Gardiner* [1875] 1 Ch D 13, a vintage case. In that case, Mellish LJ writing a separate judgment for the Court of Appeal aptly said at p. 25 of the report:

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> Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them – some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been

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> done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation.
>
> In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed?

Mellish, LJ, used the phrase "cantankerous member" to describe the situation there and likewise here I can describe the present petitioner as a "cantankerous member" who holds a mere 0.08% stake and who has the audacity to file the present petition. What a waste of the court's time? The law is clearly against him. Is he a maverick out to stir trouble?

I say that even if the acquisitions are over priced, this cannot be construed as a wrong done to a shareholder personally but rather to the company. It is trite law that the petitioner as a shareholder cannot bring an action in his own name for such an alleged wrong. The petitioner has not shown anywhere in the petition what loss, if any, he has suffered, and what rights under the articles of association have been violated. It must be borne in mind that the decision to proceed with the acquisitions have been approved by the majority of the first respondent's shareholders. As a minority shareholder the petitioner is not entitled to override the majority just because he disagrees. It is a fair statement to say that s. 181 of the Companies Act 1965 is not designed to allow a minority shareholder to interfere with the decisions made by the board of directors or the majority of the shareholders. A shareholder does not have the legitimate expectations to dictate the management of a public company. There must be oppression or disregard and the petitioner must identify and prove those elements categorically (*Re Kong Thai Sawmill (Miri) Sdn Bhd, Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung (supra);* and *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals (supra)*). The alleged over-pricing of the acquisitions seems to be the focal point of dispute by the petitioner. It pertains and relates to the business policy or business judgment of the first respondent's board of directors and shareholders. I must

reiterate that the mere fact that the board of directors or the majority of the shareholders make decisions that a shareholder does not agree with is not enough to vest the shareholder with the right to challenge the majority rule. In law, the petitioner must accept the majority rule. An aggrieved shareholder like the petitioner can sell his stakes and go elsewhere if he is not happy with the majority rule of the first respondent. Being a public listed company, the majority rule reigns supreme in the first respondent. As a minority shareholder, the petitioner does not have any legitimate expectation to dictate the management decisions of the board of directors. I venture to say that the courts will be very cautious and will not second-guess management decisions of companies. As long as the decisions were not taken unreasonably or without any foundation, the fact that the decisions may be wrong does not entitle disgruntled shareholders to apply under s. 181 of the Companies Act 1965. The mere fact that the majority of the shareholders or the board of directors did not choose to be guided by one shareholder's views does not entitle that shareholder to claim that he was oppressed. Judith Prakash JC (as she then was) in *Re Tri-Circle Investment Pte Ltd* [1993] 2 SLR 523 at p. 534 aptly said:

> The court, however, is not here to second guess management decisions of corporations. As long as such decisions are taken honestly and in good faith the fact that they are wrong decisions does not entitle disgruntled shareholders to apply for relief under s. 216. Assessing the motives of the majority from the evidence available to me it appears to me that they were running the business of the company honestly, ie in the bona fide belief that they were doing what was best for their shareholders and the company itself. They did not act unreasonably without any foundation for such belief. As businessmen they held the view, based on experience, that it takes time and effort for an investment to become profitable. They discussed the development of the business at length and indeed, allowed the petitioners (in particular Mr. Fong) the full opportunity to air their views. They did not, however, choose to be guided by the petitioners' opinions. That was the prerogative of the majority as long as it was not a prerogative exercised in bad faith or wilfully disregarding the minority's interests for ulterior purposes.

At any rate, it is important to note that nowhere in the petition has the petitioner stated or even alleged that a fundamental understanding or agreement exists whereby the petitioner, with a 0.08% shareholding, is entitled to override the decision of the first respondent's board of directors and the resolution of the majority of the first respondent's shareholders. I would go so far as to say that even if the petitioner can show that some managerial decision has prejudiced his interests that is still insufficient at law to afford relief under

s. 181 of the Companies Act 1965. It must be borne in mind that a shareholder upon joining a company will be deemed to have accepted the risk that decisions will be taken in the wider interests of the company which may prejudice his interests. I say with alacrity that a member who is consistently out-voted does not mean that he is oppressed or that his interests are being disregarded *(Re Tri-Circle Investment Pte Ltd (supra))*. Section 181 of the Companies Act 1965 does not give jurisdiction to the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law (*Re Bright Pine Mills Pty Ltd* [1969] VR 1002, 1011). The petitioner who invests money in the first respondent cannot legitimately expect to have a say in the running of the company unless he makes a take-over bid and decides to take over the affairs of the first respondent. It is ideal to reproduce the speech of Neill LJ in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, CA, at p. 31:

> In order to establish unfairness it is clearly not enough to show that some managerial decision may have prejudiced the petitioner's interest. A shareholder on joining a company will be deemed to have accepted the risk that in the wider interests of the company decisions may be taken which will prejudice his own interests. Thus it may be necessary for the directors to take steps which are prejudicial to some of the members in order to secure the future prosperity of the company or even its survival: cf *Nicholas v. Soundcraft Electronics Ltd* [1993] BCLC 360 at 372 per Ralph Gibson LJ. Though it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of the shareholders the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct: see *Re Elgindata Ltd* [1991] BCLC 959 at 993.

It was pointed out by the petitioner that some shareholders should have refrained from voting in favour of the acquisitions. To this, I have this to say:

(1) that the petitioner has only made unfounded inferences and conclusions that the vendors of the acquiree companies are nominees for persons unknown and that the majority shareholders are related parties to the transactions; and

(2) that even if (and this is denied by the first respondent) the majority shareholders in the first respondent are related parties to the transactions, it is settled law that any shareholder is entitled in a general meeting to vote in any way he deems fit, and owes no duty to anybody as to how such vote is to be exercised *(Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals (supra))*.

It must be recalled that the petitioner was also given the opportunity to speak and vote at the shareholders' meeting on 5 February 2002. And the mere fact that the petitioner is unhappy with the vote of the body of the shareholders on 5 February 2002 does not entitle him to claim that he was oppressed *(Re Kong Thai Sawmill (Miri) Sdn Bhd., Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung (supra);* and *Re Tri-Circle Investment Pte Ltd (supra)).*

(iii) The Acquisitions Were Duly Approved By The Relevant Regulatory Or Watch Dog Authorities

It has been said that the approvals of the relevant regulatory authorities such as the EPU and the SC have been obtained for the acquisitions. These cannot be denied. Thus, it would be correct to say that the acquisitions have been duly and properly carried out and the petitioner's allegations of impropriety are completely baseless.

(iv) The Petitioner Cannot Use The Petition As A Vehicle For A "Fishing Expedition"

Realising that he had no realistic basis to challenge the valuation of Messrs. Arthur Anderson & Co, the petitioner seeks to make vague and unsubstantiated allegations in respect of the suitability or standing of the shareholders of the acquiree companies. The crux of these unsubstantiated allegations are that there are strong reasons to believe that the shareholders cum directors of PUSB and ADSB do not beneficially own the respective companies but are nominees for persons unnamed, and that these shareholders are unknown in the healthcare industry and are not corporate figures. It is obvious that there are no material facts substantiating the allegations. And to overcome that impediment, the petitioner contends that cross-examination and discovery would be needed. It is here that one can surmise that the petitioner admits that the petition is purely framed for a fishing expedition. Even assuming for the sake of argument that the petitioner's contentions on the standing of the shareholders of ADSB, PUSB and HISB are true (and this is denied by the respondents), they are wholly irrelevant. It is irrelevant as to who owns the acquiree companies. What is relevant and material is that the acquiree companies are acquired for a fair value. I reiterate that the petitioner has not challenged the basis and methodology of the valuation conducted by Messrs. Arthur Anderson & Co. There is no question left to explore. It is beyond question that the companies concerned were acquired for a fair price particularly since the acquisitions have been approved by the relevant regulatory authorities.

At the time when the petitioner files the petition, he should have a cause of action. But events have shown that he has none. It is not permissible for the petitioner to file a petition without a cause of action. It is also not permissible for the petitioner to merely hope that in the course of the proceedings he would discover such a cause of action. In the words of Vinelott J in *Re a company, ex parte Burr* [1992] BCLC 724, at 736:

> In my judgment, the petitioner has not adduced any evidence which, if accepted at the trial, would support the allegations in the petition and justify the relief sought. The petitioner's case in substance is that something might be revealed on discovery in the course of cross-examination of the directors that could be relied on as justifying the petition. That is not a proper ground for presenting a petition. The damaging effect which the presentation of the petition may have on the business of a company, even if it is not advertised, has often been the subject of judicial comment. A petition should not be presented unless it can be supported by evidence which, if accepted at the trial, would found a claim for relief.

And that would aptly describe the present petition. Hoffmann LJ sounded a warning to this effect in the case of *Re Saul D Harrison & Sons plc (supra)* at p. 22 and that warning too should apply to the present petition:

> Of course it is always possible that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up.

Any "fishing expedition" in the hope of obtaining evidence must be frowned upon. Chao Hick Tin JC in *Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors* [1989] 3 MLJ 73, 77, did just that. The sum total of it all would be this. That the petitioner has not shown any basis for claiming any relief for oppression. And so the petition should therefore be struck out forthwith in order to obviate the necessity for a trial. That would be the best course of action to take and I do so accordingly. I hereby allow encl. 22 with costs.

Enclosure 23

I will now proceed to examine encl. 23. The same parties are involved. The same nomenclatures would be adopted as was adopted in considering enclosure 22. This is an application by both the respondents to strike out the petition of the petitioner pursuant to O. 18 r. 19(1)(b) or (c) or (d) of the RHC. The petition is seen in enclosure one (1) and it is rather bulky. I have earlier reproduced the reliefs which the petitioner seeks in enclosure one (1) when I considered encl. 22.

Now, the second respondent had entered into three separate share sale agreements dated 28 February 2000 to acquire the entire issued and paid up share capital of ADSB and HISB. A public announcement concerning the acquisitions was made by the first respondent to the KLSE on 29 February 2000. It must be emphasised that this public announcement sets out the particulars of the acquisitions including the consideration sum. The petitioner became a shareholder of the first respondent in January 2001, and that would be more than ten (10) months after the first respondent's aforesaid public announcement and so the petitioner had full knowledge of the acquisitions and this is not disputed at all. The petitioner then embarked on a curious and inconsistent course of conduct. He increased his shareholding in the first respondent throughout 2001. From 133,000 in January 2001 to 200,000 in December 2001, even though he was at that time complaining about the acquisitions.

Now, having become a shareholder in the first respondent, the petitioner then links his complaints about the acquisitions with his personal requests. The scenario may be stated in this way. With prior knowledge of the acquisitions, the petitioner acquired shares in the first respondent and almost immediately thereafter the petitioner started to complain by letter dated 29 January 2001 to the first respondent in respect of the acquisitions. The petitioner then makes a personal request to the first respondent that his son by the name of Dr. Brahma who is employed by the first respondent on a contractual basis be employed on a permanent basis and he also requested for better terms of employment for his son. This request was made by the petitioner in a meeting on 19 February 2001 with the first respondent's company secretary by the name of Noel Chua and this is reflected in the first respondent's letter dated 21 February 2001 and the petitioner's letter dated 23 February 2001. February By a letter dated 21 February 2001, the first respondent informed the petitioner that they would look into his personal request. Apparently being satisfied that his personal request was being looked into the petitioner by letter dated 23 February 2001 stated that he did not intend to raise any further queries in respect of the acquisitions and instead assured the first respondent that he would now support the first respondent. In fact, the petitioner admits that his complaints about the acquisitions were linked to his personal requests by admitting in the petitioner's fourth (4th) affidavit to the effect that as the chairman of the first respondent had given his assurance that the petitioner's personal requests would be given due and proper consideration, the petitioner had by his letter dated 23 February 2001 stated that he would support the first respondent at all times. As an indication of his undying support and in a complete turn around from his earlier complaints in respect of the acquisitions,

the petitioner then wrote to the SC on 5 March 2001 on an urgent basis complaining that there was an inordinate delay by the SC in approving the acquisitions.

But when it appeared to the petitioner after a short while that his personal requests were not being accommodated to his satisfaction, the petitioner then began to show his true colours. The ugly side of the petitioner surfaced. In the words of Abraham Lincoln (as reported by Alexander K. McClure in "Lincoln's Yarns and Stories"):

> You may fool all the people some of the time; you can even fool some of the people all the time; but you can't fool all of the people all the time.

This was what the petitioner did:

(1) press and instigate the first respondent for more favourable terms in respect of his son's employment through a letter dated 15 March 2001;

(2) at about the same time, the petitioner renewed his objections to the acquisitions by his letters dated 29 March 2001, 9 August 2001, 15 August 2001, 5 October 2001, 13 November 2001 and 19 November 2001;

(3) whilst complaining about the acquisitions, the petitioner offered by his letter dated 19 April 2001 to sell his entire shareholdings in the first respondent to any of the existing substantial shareholders of the first respondent and sought the assistance of the company secretary of the first respondent in this respect and he offered to sell his shares for a total sum of RM2.5 million equivalent to approximately RM15.15 per share when the market price of the shares at that time was approximately RM2.84; and

(4) the petitioner, at about the same time, made a sudden u-turn in his correspondence with the SC and he purported to object to the acquisitions on the ground that it was over-priced and that it would dilute his shareholding.

That is not enough. The petitioner then threatened to file a petition under s. 181 of the Companies Act 1965 and he too threatened to obtain an injunction against the first respondent. These threats were not imaginary. These threats were contained in a letter dated 26 April 2001 from the petitioner, and in another letter dated 15 May 2001 from the petitioner's solicitors and in yet another letter dated 29 May 2001 from the petitioner's solicitors and in another letter dated 10 October 2001 from the petitioner to the SC and in yet another letter dated 2 January 2002 from the petitioner and, finally, from another letter dated 3 January 2002 from the petitioner.

Having threatened the first respondent with legal action, namely, to file a petition under s. 181 of the Companies Act 1965, the petitioner had the audacity to make the following requests:

(1) at a meeting on 30 November 2001 with the first respondent's solicitors, he renews his request in respect of his son Dr. Brahma; and

(2) the petitioner had also sought to get the first respondent to purchase his daughter's four (4) storey shop house at a consideration of RM1.39 million (the name of his daughter is Anusha Balakrishnan).

The first respondent rightly replied by its letter dated 10 January 2002 to the effect that it would not be held at ransom by the petitioner's personal requests and threats. In response, the petitioner by letter dated 11 January 2002 stated that the request to purchase his shareholding was made as a joke and he then repeated his threat to commence legal action against the first respondent. The petitioner then filed the present petition.

Lord Byron in Don Juan sounded a warning when he said:

> Of all the horrid, hideous notes of woe,
> Sadder than owl songs or the midnight blast,
> Is that portentous phrase, 'I told you so'.

How apt is that phrase when applied to the petitioner who wants to help his son and daughter in life? It is certainly apt as it rings true to the facts of this case. The first respondent brooks no nonsense and will take up a cudgel to challenge the petitioner. The petitioner should be told not to threaten the first respondent.

I will now proceed to the other salient features of this case under different sub-heads.

The Petitioner Does Not Object To The Acquisitions *Per Se*

I have said it before. It is this. That the petitioner has no objections to the acquisitions and, in fact, he has conceded that the acquisitions is beneficial to the first respondent. That the petitioner's sole complaint is that Messrs. Arthur Anderson & Co., is not an independent valuer and therefore he says that its valuation of the consideration of the acquisitions should not be accepted. But as I said earlier the petitioner does not dispute the basis and methodology adopted by Messrs. Arthur Anderson & Co in valuing ADSB, PUSB and HISB.

The Regulatory Approval For The Acquisitions Have Been Duly Obtained

The approvals in regard to the acquisitions and all the terms in respect thereof including the valuation and pricing from all the regulatory authorities have been obtained. The following summary would suffice:

(i) the approval from EPU was obtained on 19 April 2001;

(ii) the approval from the SC was given on 10 May 2001;

(iii) the approval from the Foreign Investment Committee ("FIC") was obtained on 23 May 2001; and

(iv) the approval from the KLSE for the listing and quotation of the new shares in the first respondent was obtained on 8 March 2002 (it is ideal to mention that subsequent to the dismissal of the petitioner's summons in chambers on 6 March 2002, the new shares in the first respondent issued in consideration of the acquisitions was listed on the KLSE on 22 March 2002).

It must be borne in mind that Messrs. Arthur Anderson & Co's valuation was forwarded to the SC on 8 September 2000 by the Commerce International Merchant Bankers Berhad ("CIMB") pursuant to a request by the SC dated 1 September 2000. Subsequent thereto, the approval of the SC was given on 10 May 2001.

The First Respondent Had Not Disregarded The Petitioner

The first respondent's representatives had met with the petitioner on three (3) separate occasions in respect of the complaints by the petitioner. The first occasion was on or about 19 February 2001 wherein Noel Chua (the respondents' company secretary) and Lim Poh Seong met the petitioner who aired his views on the acquisitions. The petitioner too had by letter dated 23 February 2001 thanked the first respondent for that meeting and indicated his support for the first respondent. Another meeting was held between Noel Chua and the petitioner on or about 17 April 2001 and in that meeting the petitioner offered to sell his shareholding in the first respondent at the price of RM15.15 per share. By way of a letter dated 26 November 2001, the first respondent also agreed to the petitioner's request for another meeting in order to discuss the queries raised by the petitioner in his letter dated 19 November 2001. Interestingly, Dato' Dr. Abdul Aziz bin Mahmood (the first respondent's chairman), Dato' Lim Tong Yong (the executive director of the first respondent) and Noel Chua met the petitioner on 30 November 2001 and in that meeting the petitioner further aired his views on the acquisitions and at

the same time handed over a letter dated 30 November 2001. At this meeting, the petitioner pressed the issue of a personal request in respect of his son – Dr. Brahma.

In addition to that, the first respondent also supplied the petitioner with copies of documents requested by the petitioner, namely:

(1) the list of shareholders who attended the annual general meeting of the first respondent held on 13 November 2001 as well as the minutes of that meeting; and

(2) copies of the letters from the first respondent's chairman to the first respondent's company secretary and chief executive officer respectively dated 15 May 2001 and 16 May 2001.

It is rather obvious that full and detailed disclosures in respect of the acquisitions as well as the effect of the acquisitions on the composition and shareholdings of the first respondent's substantial shareholders were made in the first respondent's circular to its shareholders for the shareholders' meeting on 5 February 2002. The petitioner knew about this.

The Acquisitions Were Duly Approved By The First Respondent's Shareholders At The Shareholders' Meeting Of 5 February 2002

A general meeting of the first respondent's shareholders to consider and approve the acquisitions was convened on 5 February 2002. The petitioner attended the shareholders' meeting and was given the opportunity to speak and vote thereat. The votes at the shareholders' meeting were taken by a show of hands. Even though the petitioner is a minority shareholder, his vote carries the same weight at the meeting with that of any substantial shareholder because voting by a show of hands is on the basis of one man to one vote. Greatly outnumbered the acquisitions were duly approved by the first respondent's shareholders at the said meeting which was held on 5 February 2002.

The Basic Principles For Striking Out Under O. 18 r. 19(1)(b) or (c) or (d) Of The RHC Against The Petition

The approach to be adopted would be this. The court will submit the evidence to critical examination and to scrutinise the evidence in order to determine whether:

(1) the action is bound to fail – meaning it is frivolous or vexatious; or

(2) there has been an abuse of the process of the court.

(See *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, SC; and *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1).

Of course, in examining the evidence the court has to adopt the following two approaches:

(a) to examine the evidence adduced with a fine toothed comb; and

(b) to assess whether there is any conflict of affidavits or material points.

These two approaches would be effective in that seemingly triable or difficult issues can be readily decided in such a way as to lead to the conclusion that the action is bound to fail. It is part and parcel of my judgment that having reflected quite considerably on the available evidence, I hold that there is no conflict in the affidavits nor is there any conflict as to the material facts. The undisputed facts as well as the evidence gleaned from all the affidavits show conclusively that the action is an abuse of process and it is otherwise manifestly unsustainable and bound to fail.

Reasons As To Why The Petition Ought To Be Struck Out

For this exercise, I shall consider the following points:

(1) The Petition Is Frivolous Or Vexatious Under O. 18 r. 19(1)(b) Of The RHC

I say that an action will be struck out as being frivolous or vexatious where the action is shown to be manifestly unsustainable or where the issues raised are without merit and unjustified (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd (supra)*; and *Ong Lean Sim & Anor. v. Tio Kah Hin & Ors*. [1985] 1 MLJ 270). Here, I hold that the petition is manifestly unsustainable, both on the facts and on the law, and the issues raised by the petitioner are completely devoid of merit for the following reasons:

(a) the petitioner acquired his shares in the first respondent with full knowledge of the acquisitions;

(b) the acquisitions were approved by the first respondent's shareholders and the petitioner was never disregarded in this matter;

(c) the acquisitions were duly approved by the relevant regulatory authorities as alluded to earlier; and

(d) the petitioner does not even object to the acquisitions *per se*.

(2) The Allegations In The Petition Are Scandalous Under O. 18 r. 19(1)(b) Of The RHC

I say that the allegations are scandalous if they are irrelevant for purposes of proving any facts properly in issue (*Christie v. Christie* [1873] LR 8 Ch App 499 at 503). At para. 8.8 of the petition, the petitioner alleged that the first respondent has not complied with s. 365(1A) of the Companies Act 1965. With respect, the petitioner knew that that section had been repealed and so it must be held that this issue to be nothing short of being scandalous.

On reflection, I must say that the petitioner does not challenge the acquisitions in itself nor does he challenge the basis used in arriving at the valuation nor does he challenge the suitability of the valuation methodology employed by Messrs. Arthur Anderson & Co. It seems to me that the petitioner is unhappy that Messrs. Arthur Anderson & Co is not an independent valuer solely on the basis that the latter is the auditor for ADSB, PUSB and the first respondent. In response, I must say that this fact alone does not render Messrs. Arthur Anderson & Co biased for the following reasons:

(i) that Messrs. Arthur Anderson & Co is not merely the auditor for the acquiree companies but it is also an auditor for the first respondent;

(ii) that if Messrs. Arthur Anderson & Co was the auditor for merely the acquiree companies and not for the first respondent, then there may be an allegation of biasness and it is not the case here;

(iii) in fact, the acquisition price ascertained by Messrs. Arthur Anderson & Co is indeed favourable to the respondents; and

(iv) that the consideration for the acquisitions consisted of the issuance of a total of 92,966,361 shares in the first respondent at the ex-bonus price of RM3.27 per share. And that although at around the time of completion, the ex bonus price of the first respondent's shares had dropped to RM1.30 per share, there was no upward revision of the amount of shares in the first respondent to be issued for the acquisitions. To me, this is clearly beneficial to both the respondents and its shareholders as well as the petitioner.

Time was accorded to the petitioner to file a further affidavit when he sought for one. The court had willingly allowed the petitioner to affirm a further affidavit to enable him to substantiate his allegations in regard to the valuation of the acquisitions. In pursuance thereto the petitioner affirmed his fifth affidavit. But that affidavit does not challenge the methodology of the valuation by Messrs. Arthur Anderson & Co.

I have deliberated at length and I have come to the conclusions that the petitioner's unsubstantiated allegations on the independence of Messrs. Arthur Anderson & Co and the standing of the various shareholders of the acquiree companies are completely irrelevant to the questions of whether the petitioner was oppressed or disregarded as a shareholder or whether the acquisitions were made at a fair price. In my judgment, all the allegations advanced by the petitioner are scandalous.

(3) The Allegations In The Petition Would Only Operate To Prejudice And Embarrass A Fair Trial Under O. 18 r. 19(1)(c) Of The RHC

It must be emphasised that a shareholder does not have legitimate expectations to dictate the management of a public company. There must be oppression or disregard before the petitioner can succeed and it is the duty of the petitioner to identify categorically and prove these elements. The facts all fall in favour of the respondents. I reiterate that the petitioner has bought his shares with full knowledge of the acquisitions. The petitioner was allowed to speak and vote at the shareholders' meeting which approved the acquisitions. How could the petitioner say that he has been oppressed or disregarded? The allegations in regard to the standing of the shareholders and the biasness in the valuation remain unsubstantiated. Pure and simple, the petition is in the nature of a "fishing expedition". Under the law, the petitioner is not entitled to use the petition as a means to extract evidence that he may find useful to support the petition at a later stage. There is no cause of action at the time of filing the petition. It is not permissible for the petitioner to file the petition without a cause of action. The petition ought to be struck out.

As I said, the petitioner holds only 0.08% of the first respondent's shareholding and he does not and cannot speak for the vast majority of the first respondent's shareholders who have voted in favour of the acquisitions.

(4) The Petition Is An Abuse Of The Process Of The Court Under O. 18 r. 19(1)(d) Of The RHC

This court possesses an inherent jurisdiction to prevent an abuse of its process irrespective of whether it had been expressly called for or not in an application under O. 18 r. 19 of the RHC *(Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd (supra))*. As phrased and framed and based on the facts and the law, the petition is an abuse of the process of the court for the following reasons:

(1) the petition cannot be used to further the desire of the petitioner for a "fishing expedition";

(2) the petitioner links his complaints in regard to the acquisitions with his personal requests;

(3) the petitioner continues purchasing shares while complaining, at the same time, about the acquisitions; and

(4) the petitioner is estopped from presenting the petition.

For all these reasons, I too allow encl. 23 with costs.

Addendum

The rule in *Foss v. Harbottle* [1843] 2 Hare 461, [1843] 67 ER 189 concerns itself with:

(a) the right of a company to sue for any wrong done to itself as against the *locus standi* of its members to sue; and

(b) the sanctity of the wishes of the majority of the members in a company regulating its own affairs should prevail.

The rule in *Foss v. Harbottle* is to prevent judicial interference in the internal management of companies. But if the interest of the minority is ignored, that minority may seek recourse under s. 181 of the Companies Act 1965. But as pointed out in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor (supra)* at p. 128 to p. 129 of the report, that what Lord Wilberforce had said in *Re Kong Thai Sawmill (Miri) Sdn. Bhd; Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. v. Ling Beng Sung (supra)* "were mere guidelines and not inflexible propositions of law: for, the question whether there was oppression or disregard or unfair discrimination or whether the conduct complained of was 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case". That is the reason why, in this judgment, I have gone into the facts in some detail in the course of adjudicating encls. 22 and 23. The facts do not favour the petitioner at all.